

ANNALS OF HEALTH LAW
Advance Directive

VOLUME 20

SPRING 2011

PAGES 44-56

**The Regulation of Rescission: Is a National Standard
Necessary?**

*Sam Richardson**

I. INTRODUCTION

Current health care reform evolved out of a commitment to increase the quality, access, and security of health care for all Americans. The Patient Protection and Affordable Care Act (PPACA) addressed access concerns by promising to provide more health benefits for more Americans.¹ PPACA's flagship protections, often referred to as the "new Patient Bill of Rights", proposed several amendments aimed at protecting health insurance consumers. These consumer protections included, among other protections, a prohibition on preexisting condition exclusions, no lifetime or annual monetary limits on health insurance benefits, and a prohibition on health insurance rescission.² This article will focus on the practice of rescission in the individual health insurance market, which has been characterized as "one of the truly egregious practices occurring in the health insurance market".³

* Juris Doctor Candidate, Loyola University Chicago School of Law, Class of 2012. Mr. Richardson is a staff member of *Annals of Health Law*.

1. Barack Obama, U.S. President, Address to Congress on Health Care (Sept. 9, 2009), *available at* <http://millercenter.org/scripps/archive/speeches/detail/5548>.

2. 42 C.F.R. §§ 144, 146, 147 (2010).

3. *Termination of Individual Health Policies by Insurance Companies: Hearing Before the Subcomm. on Oversight & Investigation of the H. Comm. on Energy & Commerce*, 111th Cong. 41 (2009), *available at* http://democrats.energycommerce.house.gov/Press_111/20090616/transcript_20090616_oi.pdf (statement of Rep. Schakowsky, Member, H. Comm. on Energy and Commerce) [hereinafter *Hearing Transcript*]; *see also* Gary Schuman, *Post-Claim Underwriting: A Life & Health Insurer's Right to Investigate or Bad Faith?*, 45 *TORT TRIAL & INS. PRAC. L.J.* 697, 697, 701 (2010) (specifying that those enrolled in employer-sponsored health plans are generally not the target of rescission since coverage is guaranteed regardless of health. Conversely, individual and small group insurance is not guaranteed and almost always is underwritten and thus subject to rescission actions.); *see also* Letter from Roger Sevigny et al., Nat'l Ass'n of Ins. Comm'rs, to Honorable Bart Stupak, U.S. House of Representatives & Honorable Greg Walden, U.S. House of

First, this article will explain the practice of rescission as it affects the average American. Second, this Article will analyze the arguments for and against restricting the use of rescission and how the issue has been previously addressed by states. Third, this article will discuss how Congress reconciled those arguments in the language of PPACA. Lastly, this article evaluates the PPACA prohibition on rescission in light of its goal to increase access. Ultimately, although the national standard will curtail the overall practice of rescission by insurers, diligent enforcement by state agencies is necessary for the prohibition to provide full protection to Americans.

II. THE HISTORICAL PRACTICE OF RESCISSION IN AMERICA

In August of 2003, Otto Raddatz, a fifty-nine-year-old restaurant owner from Illinois, purchased health insurance from Fortis Health.⁴ Over a year later, Otto was diagnosed with an aggressive form of non-Hodgkin's lymphoma.⁵ He immediately began chemotherapy and was informed that he would need a stem cell transplant to live.⁶ Luckily, Otto's initial treatments were covered by his insurance.⁷ As Otto's chemotherapy treatments intensified in preparation for the transplant, Fortis notified him that his insurance policy was being rescinded, canceling all of his coverage back to August of 2004.⁸ For Otto, this meant that none of the cancer treatments he had received would be covered and the lifesaving stem cell transplant would be canceled.⁹ Without the financial assistance afforded by insurance coverage, Otto could not afford the procedure.¹⁰ Fortis told Otto that his coverage was being rescinded due to omissions in his application for coverage; Fortis had performed a routine review and discovered a CT scan from 2000 showing a minor aneurysm and some small gallstones that Otto failed to

Representatives (July 24, 2009), http://www.naic.org/documents/testimony_0907_resciissions_sevigny_vaughan_praeger_ario.pdf [hereinafter NAIC Letter] (echoing the sentiments of Rep. Schakowsky by stating "given the particularly harmful nature of rescissions, state regulators recognize that even one confirmed case of abuse is too many.").

4. STAFF OF COMM. ON ENERGY & COMMERCE, 111TH CONG., MEMORANDUM ON SUPPLEMENTAL INFORMATION REGARDING THE INDIVIDUAL HEALTH INSURANCE MARKET 10 (COMM. PRINT 2009), http://democrats.energycommerce.house.gov/Press_111/20090616/resciission_supplemental.pdf [hereinafter HEARING SUPPLEMENT]; *Hearing Transcript, supra* note 3, at 4 (statement of Rep. Stupak, Member, H. Comm. on Energy and Commerce).

5. *Hearing Transcript, supra* note 3, at 4; HEARING SUPPLEMENT, *supra* note 4, at 10.

6. *Hearing Transcript, supra* note 3, at 4.

7. *Id.*

8. *Id.* at 58 (statement by Peggy Raddatz).

9. *Id.*

10. *Id.* at 4.

disclose on his insurance application.¹¹ In reality, Otto's doctor had never told him about these conditions; nor did Otto receive treatment for, or experience any symptoms from, either condition.¹² Most notably, these pre-existing conditions were not medically related to Otto's cancer.¹³ With the window for his transplant closing, Otto's sister, herself an attorney, turned to the Illinois Attorney General for help.¹⁴ Under pressure from the Illinois Attorney General, Fortis reversed the rescission decision, and Otto was able to receive the transplant that allowed him to live three more years.¹⁵ The outcome of Otto Raddatz's story, however, is the exception rather than the norm. Most policyholders do not have the same access to an attorney, and without the benefit of an attorney for a sister and an active State Attorney General, insurance rescission would have easily left Otto bankrupt and cost him the last three years of his life.¹⁶

III. THE CONFLICTING ARGUMENTS ON RESCISSION

Ottis Raddatz's story was told before the House Committee on Energy and Commerce on June 16, 2009,¹⁷ at a hearing entitled "Termination of Individual Health Policies by Insurance Companies." The hearing focused on a commonplace insurance practice known as rescission.¹⁸ Rescission is the cancelation of a contract due to certain kinds of default by a party, declaring the contract void in its inception.¹⁹ In an insurance context, a rescission occurs when an insurer retroactively cancels a customer's coverage based on misrepresentation in the application, even if the premiums are kept current.²⁰ A rescission nullifies a policy to the effect that it is as if a contract between the insured and the insurer was never formed.²¹ As a health insurance practice, rescission is largely "limited to medically underwritten health insurance markets", which includes individual health insurance policies.²² Rescission usually follows post-claim underwriting, which is

11. *Hearing Transcript, supra* note 3, at 58.

12. *Id.*

13. *Id.*

14. *Id.* at 59-60.

15. *Id.* at 5.

16. *Hearing Transcript, supra* note 3, at 59.

17. *Id.* at 4.

18. *Id.* at 1, 4.

19. BLACK'S LAW DICTIONARY 1306 (6th ed. 1991)

20. Bruce Japsen, *Rescinding Consumers' Insurance Coverage to End*, CHI. TRIB., July 6, 2010, at C1.

21. Schuman, *supra* note 3, at 705.

22. NAIC Letter, *supra* note 3, at 1; The U.S. Census Bureau estimates that approximately 27 million Americans, including approximately 17 million nonelderly individuals, have directly bought health insurance

the “process of retrospectively investigating an insured’s application . . . only after the insured has made a claim” under their coverage.²³ The rescission of an insurance contract is the usual remedy given to insurers for misrepresentation by an individual on their insurance application.²⁴

The typical health insurance rescission follows the same pattern as the story of Otto Raddatz: an insured patient files a major claim, the insurer scrutinizes the claimant’s medical history and compares it with their application, looking for any misrepresentations or omissions. Any discrepancies found can be used as grounds for a rescission action.²⁵ Thus, whenever a policy is obtained based on incorrect material information communicated by the insured, the insurer is contractually guaranteed the right to rescind the policy.²⁶ Put simply, “when it comes to health care rescissions, hindsight is 20/20.”²⁷

Due to the fact that, in most cases, even an innocent misrepresentation on an application will provide the grounds for rescission, “a health plan seeking to rescind the coverage of an ill patient will almost certainly find a reason to do so.”²⁸ An individual who relies on their health coverage only to have it rescinded is left in an extremely vulnerable position, it is likely he has ongoing treatment that he must then pay for out-of-pocket, leaving him with crippling medical debt, and making him virtually uninsurable in the future.²⁹ The rescission of health insurance effectively limits an individual’s access

each year between 2002 and 2009 *see generally* *Health Insurance Historical Tables: HIA-1 and HIA-6*, U.S. CENSUS BUREAU (2010), <http://www.census.gov/hhes/www/hlthins/data/historical/index.html> [hereinafter *Census Table HIA-1* and *Census Table HIA-6*] (estimating that approximately 27 million Americans, including an estimated 17 million non-elderly individuals, have purchased individual health insurance each year between 2002 and 2009); *but see* Gary Claxton & Janet Lundy, *How Private Health Coverage Works: A Primer*, THE HENRY J. KAISER FAMILY FOUNDATION, 1 (April 2008), <http://www.kff.org/insurance/upload/7766.pdf> (estimating that only 14 million non-elderly people bought health insurance directly in 2006).

23. Lori J. Parker, *Cause of Action for Wrongful Rescission of Health Insurance Policy When Fraud, Misrepresentation, or Misstatement Regarding Insured’s State of Health is Raised as Defense*, 45 CAUSES OF ACTION 2D 1, §12 (2010). *See generally* Thomas C. Cady & Georgia Lee Gates, *Post Claim Underwriting*, 102 W. VA. L. REV. 809 (2000) (providing an extensive overview of the practice of post-claim underwriting in insurance).

24. Brian Barnes, *Against Insurance Rescission*, 120 YALE L.J. 328, 332 (2010).

25. Gerald S. Flanagan, Note and Comment, *A Healthy State of Mind: The Role of Intent in Health Care Service Plan Rescissions*, 43 LOY. L.A. L. REV. 291, 293 (2009); *see also* NAT’L ASS’N OF INS. COMM’RS, RESCISSION DATA CALL OF THE NAIC REGULATORY FRAMEWORK (B) TASK FORCE 11-12 (2009), <http://www.insurance.illinois.gov/hiric/RescissionDataCall.pdf> [hereinafter NAIC DATA CALL] (listing the sources of information insurers use for underwriting and sources of information used by insurers in considering rescission).

26. Schuman, *supra* note 3, at 705.

27. Flanagan, *supra* note 25, at 298.

28. *Id.*

29. *See* Barnes, *supra* note 24, at 332; *see* Lisa Girion, *Sick but Insured? Think Again*, L.A. TIMES, Sept.

to health care in the past (via its retroactive nature), present (in its ability to deny a present claim) and future (as the individual now has a condition that is “preexisting”, making it more difficult to obtain new insurance).³⁰

As a smaller percentage of Americans are obtaining health insurance through their employer and unemployment numbers remain high, more Americans are turning to individual health insurance plans for coverage.³¹ Because rescissions typically occur in the individual insurance market, as the number of Americans covered by these plans increases, so does the likelihood of rescission abuse.³² Until recently, any substantive data on the use of rescission was difficult to obtain since the only data tracking was done by insurance companies and they did not disclose this information.³³ This has changed in the last few years, when both the National Association of Insurance Commissioners (NAIC) and the U.S. House Committee on Energy and Commerce requested data on rescissions from the largest health insurers in the United States.³⁴ The NAIC report found the rescission rate to be 3.7 rescissions for every 1,000 policies and/or certificates written between 2004 and 2008.³⁵ The House Committee report found that WellPoint, Assurant, and UnitedHealth rescinded at least 19,776 policies between 2003 and 2007.³⁶ However, opponents of rescission stress that these numbers should be considered in light of the three following factors. First, both reports are based off of information provided by the industry they were investigating and planning on regulating.³⁷ Secondly, both reports

17, 2006, at B14.

30. While the preexisting condition issue might eventually be moot as PPACA includes a provision prohibiting preexisting condition exclusions by insurers, it does not go into effect for adults until 2014. Prohibition of Preexisting Condition Exclusions, 26 C.F.R. § 54.9815-2704T (2010).

31. CENSUS TABLE HIA-6, *supra* note 22; *Hearing Transcript*, *supra* note 3, at 104 (statement of Don Hamm, CEO, Assurant Health).

32. See Schuman, *supra* note 3, at 701; see Anna Wilde Mathews, *Going it Alone When Buying a Health Policy: Focusing on Premiums Risks a Nasty Surprise When the Bills Arrive*, WALL ST. J., June 24, 2009, at D1 (predicting the continued growth of individuals under individual policies to grow to 20 million in 2010); see generally NAIC DATA CALL, *supra* note 25, at 3 (charting the growth of individual major medical policies in force from 46 companies from 2.7 million in 2004 to roughly 4 million in 2008).

33. Girion, *supra* note 29.

34. See NAIC DATA CALL, *supra* note 25, at 2 (stating that the NAIC collected data submitted by 46 companies that wrote individual major medical policies, and the data collected represented a sample of 70% of the covered lives from 2004-2008); see HEARING SUPPLEMENT, *supra* note 4, at 7-8 (stating that the commission collected data submitted by the three insurance companies at the hearing from 2003-2007).

35. NAIC DATA CALL, *supra* note 25, at 1, 5.

36. HEARING SUPPLEMENT, *supra* note 4, at 7-8.

37. NAIC DATA CALL, *supra* note 25, at 2 (“[NAIC] asked each company for the total number of individual major medical policies issued and in-force by state for each year, as well as the total number of rescissions by state per

commented on problems with data collection.³⁸ Finally, while the number of rescissions may seem small, their financial impact is not: the 19,776 rescissions in the House Committee report saved the three insurance companies at least \$300 million.³⁹ Furthermore, although the number of people affected by the rescission process may be small, those affected are often the most vulnerable to the financial consequence.⁴⁰

a. Insurer's Defense of Rescission

Even as rescission has become a controversial topic, insurers have consistently defended the practice.⁴¹ The crux of their argument is that rescission is necessary to prevent fraudulent claims and keep premiums down for the honest consumer.⁴² Insurers argue that without the option of rescission, the insured has no contractual burden of good faith to provide accurate information, and this loophole will effectually turn “health insurance” into “sick insurance”, causing overall costs to skyrocket.⁴³ Proponents of rescission argue that restricting an insurer’s right to investigate post-claim means that the insurer is forced to do all of their underwriting at the time of application.⁴⁴ Additionally, in doing their pre-claim underwriting, an insurer would be forced to always assume deception on the part of the applicant until investigation indicates otherwise, raising premiums and increasing the wait time between application and coverage.⁴⁵ Furthermore, insurers maintain that they are not fiduciaries, and therefore owe no special duty to their customers.⁴⁶ Even though the practice is severe, insurers repeatedly point out that rescission is extremely limited in its application.⁴⁷

b. The Call for the Regulation of Rescission

Opponents of rescission have responded to these defenses in several ways. First, it has been argued that post claim underwriting, the practice which rescission is predicated on,

year.”); HEARING SUPPLEMENT, *supra* note 4, at 1 (“Committee sent document requests to 50 state insurance commissioners and three health insurance companies that provide individual health insurance policies, Assurant Health, WellPoint, Inc., and UnitedHealth Group.”).

38. NAIC DATA CALL, *supra* note 25, at 2; HEARING SUPPLEMENT, *supra* note 4, at 7.

39. HEARING SUPPLEMENT, *supra* note 4, at 8.

40. Jaspen, *supra* note 20.

41. *Hearing Transcript*, *supra* note 3, at 106, 110, 113.

42. Schuman, *supra* note 3, at 704, 718.

43. *Id.* at 700, 704, 718.

44. *Id.* at 759.

45. *Id.*

46. *Id.* at 720.

“is a vehicle for opportunism in the insurance relationship” and per se bad faith on the part of the insurer.⁴⁸ In the practice of health insurance, it is alleged that insurers can “simply lie in wait, collecting premiums and earning interest until an insured becomes seriously ill” and subsequently rescind the contract and avoid a payout.⁴⁹ Furthermore, reformers argue that since the initiation of a rescission action is in the sole control of the insurer, “rescission systematically overcompensates the insurer by allowing it to retain the premiums paid by people it does not actually insure.”⁵⁰ For example, there could be a large number of people with a condition similar to Otto Raddatz but the insurer will not employ rescission until they make a claim, thus making the insurance policies of those individuals illegal illusory contracts.⁵¹

Second, opponents contend that rescission is not used to combat fraud, but to increase the profitability of insurance companies by reducing payouts.⁵² Furthermore, while it has been difficult to prove, opponents maintain that health insurers give bonuses based on successful rescissions.⁵³ Where courts have found the practice of rescission to be a means for cost containment, profit maximization, or the basis for bonuses, rescission has been uniformly punished.⁵⁴

Finally, rescission “horror stories” have a substantial impact on the public’s awareness and perception of rescission. Personal anecdotes such as Otto Raddatz’s are numerous and are extremely effective tools for both opponents of rescission and lawmakers.⁵⁵ The President of the United States used Otto’s story, among others, in his address to Congress

47. *Hearing Transcript, supra* note 3, at 106, 114.

48. Cady & Gates, *supra* note 23, at 810, 826-28.

49. Schuman, *supra* note 3, at 711.

50. Barnes, *supra* note 24, at 336.

51. See also William B. Maguire, Comment, *A Call for Minnesota to Prevent Health Insurance Rescissions Following Post-Claims Underwriting*, 33 *HAMLIN L. REV.* 137, 144-45 (2010) (explaining illusory contracts).

52. See Flanagan, *supra* note 25, at 306 n. 111 (“Since the rescission surge beginning in 2001, HMOs have experienced an explosion in profitability. Between 2001 and 2005, HMOs . . . [have] increased their first-quarter profits by 990 percent.”).

53. Girion, *supra* note 29 (“ . . . according to the depositions of Blue Cross and Blue Shield employees, fraud has little to do with it [rescissions.]”); *HEARING SUPPLEMENT, supra* note 4, at 18 (In 2008 case it was revealed that “Health Net paid bonuses in part based on meeting or exceeding annual targets for rescinding policies.”); *but see Hearing Transcript, supra* note 3, at 116 (assuring the Committee “there is no WellPoint policy to either factor in the number of rescissions or the dollar amount of unpaid claims in the evaluation of employee performance or in calculating employees’ salary or bonuses”).

54. Schuman, *supra* note 3, at 733.

55. See *Hearing Transcript, supra* note 3; see Obama, *supra* note 1.

to garner support for health care reform.⁵⁶ These humanizing stories have provided a strong counterpoint for even the most logical pro-rescission arguments.⁵⁷

IV. MOVEMENT TOWARDS REFORMING RESCISSION

a. Historical Regulation at the State Level

Traditionally, the regulation of insurance, including market conduct such as rescission, has been the responsibility of the state.⁵⁸ With no federal rule on rescission, states developed varying standards.⁵⁹ It was state law which limited the ability to rescind health insurance policies sold within its borders.⁶⁰ The three common standards are exemplified by California's "willful" standard⁶¹, Minnesota's "material" standard⁶², and Illinois' "willful or material" standard.⁶³ Common to all three standards is the insured's remedy to restore coverage after rescission is litigation.⁶⁴

California's "willful" standard requires an insurer to show that a misrepresentation was voluntary and intentional in order to lawfully rescind the policy.⁶⁵ Additionally, pursuant to the California Health and Safety Code §1389.3, California prohibits post-claim underwriting, meaning that a health insurer must complete medical underwriting prior to granting coverage or else rescission will be illegal.⁶⁶ However, even with the strictest regulations in the nation, rescission remained a common practice in California.⁶⁷ Additional state regulatory efforts to further restrict the use of rescission in California have met a consistent gubernatorial veto.⁶⁸

Minnesota's "material" standard bars a health insurer from rescinding a policy unless

56. Obama, *supra* note 1.

57. See NAIC Letter, *supra* note 3, at 2 ("[G]iven the particularly harmful nature of rescission, state regulators recognize that even one confirmed case of abuse is too many.").

58. Claxton & Lundy, *supra* note 22, at 8.

59. HEARING SUPPLEMENT, *supra* note 4, at 6; see Jaspen, *supra* note 20.

60. Schuman, *supra* note 3, at 698 n. 6.

61. Maguire, *supra* note 50, at 150.

62. *Id.* at 147.

63. *Id.* at 155.

64. *Id.* at 148.

65. *Id.* at 150.

66. Flanagan, *supra* note 25, at 300-01.

67. See Maguire, *supra* note 50, at 138-39 ("Horton . . . [testified to the] Congressional Subcommittee, noting that despite it being against the law in California, her health insurance provider still practiced post-claims underwriting."); see HEARING SUPPLEMENT, *supra* note 4, at 17-18 (stating the fines levied against insurance companies for illegal rescission by California).

68. See Flanagan, *supra* note 25, at 294 n. 17; see Emily Berry, *Rescission Legislation Vetoed*, AM. MED.

it can show that the misrepresentations were material to the insurer's decision to accept the risk represented by the policy.⁶⁹ There is no requirement that there be a nexus between the misrepresentation on the application and the claim for treatment. To satisfy this standard, all an insurer must show is "that it never would have accepted the individual for coverage if it had known the truth about a misrepresentation made on the policy."⁷⁰

Finally, Illinois' "willful or material" standard, as the name suggests, is a combination of the two, in that it is a more lenient standard that allows for rescission under either scenario described above.⁷¹ With one of the most lenient standards in the nation, Illinois has the most rescissions in the country by volume and the second highest per capita.⁷² In claims involving rescission of health insurance coverage due to alleged misrepresentations by the insured, "the majority rule allows rescission based on a showing that the insured provided incorrect information, regardless of whether intentionally, [or] innocently done."⁷³

Even though differing state regulations can have the benefit of flexibility, this piecemeal approach to regulation had drawbacks in the regulation of rescission. Many state standards were unclear, in the words of the Illinois Insurance Director, "our law [on rescission] was ambiguous, vague and left wide latitude and discretion with the insurance industry."⁷⁴ Furthermore, it has been noted that "[c]ourts are reluctant to deploy such a harsh remedy against sympathetic policyholders, and the result is a body of case law that is difficult to reconcile with the legal rules it purports to apply", thus creating inconsistent application within a single state.⁷⁵

Most importantly, Congress found that "[a]ccording to documents provided by the companies . . . it appears that insurance companies have taken advantage of the haphazard regulatory framework by engaging in a series of controversial practices

NEWS (Oct. 26, 2009), <http://www.ama-assn.org/amednews/2009/10/26/bisb1026.htm>.

69. Maguire, *supra* note 50, at 147.

70. *Id.* at 149-50.

71. *Id.* at 155.

72. *Illinois Department of Insurance, Changes Resulting From National Health Insurance Reform*, ILL. DEPARTMENT OF INS., 2 (Mar. 22, 2010), <http://www.insurance.illinois.gov/newsrsls/2010/top10hcr2010.pdf>; NAIC DATA CALL, *supra* note 25, at 8.

73. Parker, *supra* note 23, at §11.

74. Jaspen, *supra* note 20.

75. Barnes, *supra* note 24, at 331.

involving rescissions.”⁷⁶ While there was some federally uniform rescission regulation under ERISA, it did not apply to individual health insurance plans.⁷⁷

b. PPACA’s New Federal Standard

As a result of these findings, Congress decided to address the problem federally and passed provisions in PPACA amending the Public Health Service Act (PHSA) to create a broad prohibition on rescission practices in most instances.⁷⁸ The section pertaining to rescission reads:

A group health plan and a health insurance issuer offering group or individual health insurance coverage shall not rescind such plan or coverage with respect to an enrollee once the enrollee is covered under such plan or coverage involved, except that this section shall not apply to a covered individual who has performed an act or practice that constitutes fraud or makes an intentional misrepresentation of material fact as prohibited by the terms of the plan or coverage. Such plan or coverage may not be cancelled except with prior notice to the enrollee, and only as permitted under section 2702(c) or 2742(b).⁷⁹

With this language, PPACA created a uniform federal standard for the use of post-claim rescission.⁸⁰ The new protections apply to any plan year starting after September 23, 2010, including grandfathered plans. Under the new law, rescission is only permitted in cases of fraud and intentional misrepresentation of material fact when the insured is given thirty days notice of rescission action.⁸¹

Section 2712 combines Minnesota’s material standard with California’s willful standard. In doing so, the legislation is able to balance the needs of the insured with insurers; it greatly bolsters the protections for consumers while still allowing rescission in cases of outright fraud, the explicit reason given by insurers for their practice of

76. HEARING SUPPLEMENT, *supra* note 4, at 8.

77. Parker, *supra* note 23, at §16

78. Patient Protection and Affordable Care Act, 42 USCA § 300gg–12 (West 2010) (amending the Public Health Service Act to include §2712: Prohibition on Rescission).

79. 42 U.S.C.A. § 300gg–12.

80. Nat’l P’ship for Women & Families, PPACA Implementation: Consumer Recommendations for Regulators and Lawmakers, 35 (May 2010), http://www.naic.org/documents/committees_e_hrsi_comments_Consumer_Implementation_Recommendations_5-7.pdf [hereinafter NPWF Report].

81. *Id.*; PPACA § 1001; Jaspén, *supra* note 20.

rescinding policies.⁸² The new PPACA standard would have made the rescission of Otto Raddatz's insurance illegal as a matter of law, as his omission was clearly not intentional and willful or fraud.⁸³ Furthermore, even though the new federal standard does not incorporate California's practice of placing an obligation on the insurer to investigate the accuracy of medical information on its applications, Section 2712's focus on the state of mind of the insured in determining if rescission is proper encourages insurers to thoroughly underwrite a policy at the application stage.⁸⁴

V. PPACA'S RESCISSION POLICY ACHIEVES ITS GOAL TO INCREASE ACCESS FOR AMERICANS

On January 8th, 2010, the Department of Health and Human Services, in conjunction with the Department of the Treasury and the Department of Labor, issued the interim final rule regarding rescission.⁸⁵ The rule specifically states that the protections of Section 2712 set a federal floor, leaving states free to pass laws that provide more protection for individuals.⁸⁶ As codified, the regulation defines rescission as any "cancellation or discontinuance of coverage that has a retroactive effect."⁸⁷ The regulations forbid the rescission of a covered individual unless that individual makes an intentional misrepresentation of a material fact or commits fraud.⁸⁸ Even if fraud has been committed, the issuer must give thirty-day advanced written notice to all individuals who will be affected by the rescission action.⁸⁹ With its wide application to both group and individual plans, it is likely that these protections will greatly curtail improper rescission actions.

Even before its effective date, the passing of PPACA has caused several large insurers to promise to fundamentally change their business practices and limit rescission to cases

82. Maguire, *supra* note 50, at 167.

83. *Id.*

84. Hilary Rowen, *California Court of Appeal Clarifies Standards for Rescission Based on Misrepresentation in Health Insurance Applications*, SEDGWICK LLP (Spring 2010), <http://www.sdma.com/california-court-of-appeal-clarifies-standards-for-rescission-based-on-misrepresentation-in-health-insurance-applications-05-18-2010/> ("It is even possible that PPACA will cause carriers to undertake more thorough investigations of medical information in applications . . . A misstatement with respect to a broad question . . . is likely to be treated as inadvertent; a misrepresentation with respect to a detailed follow-up question looks a lot more like fraud.").

85. Preexisting Condition Exclusions, Lifetime and Annual Limits, Rescissions, and Patient Protections, 75 Fed. Reg. at 37,192.

86. *Id.*

87. Rules Regarding Rescissions, 45 C.F.R. § 147.128 (2010).

88. *Id.*

of clear fraud, a promise these same insurers were unwilling to make less than a year earlier.⁹⁰ However, this quick change in position illustrates an important point: if PPACA is repealed, an expedited move by insurers back to practicing rescission is highly possible. At the time of this writing, two state court cases have declared the PPACA unconstitutional and will likely be decided by the U.S. Supreme Court.⁹¹ Additionally, although an initial repeal effort failed to pass the U.S. Senate on February 2, 2011, subsequent attempts to overturn PPACA are probable.⁹² Therefore, in order to guarantee that the practice of rescission is not resumed, it falls on the states to codify these protections.⁹³

VI. CONCLUSION

The vast majority of scholarly work on health insurance rescission concludes that reform is needed. Only one academic article, written by the chief litigation counsel for an insurance company, has drawn the conclusion that post-claim underwriting and rescission of health insurance is valid legal practice.⁹⁴ Furthermore, experts with experience in rescission actions have largely supported nationally uniform rescission regulation; with state legislation being blocked, federal legislation provided the simplest avenue for providing such regulation.⁹⁵ As shown above, with enforcement, Section 2712 has the potential to end the abuse of rescission.

89. *Id.*

90. Press Release, Health & Human Serv., Momentum Building on Sebelius' Challenge to Insurers to Ban Rescission Before Law Takes Effect in September (April 28, 2010), available at <http://www.hhs.gov/news/press/2010pres/04/20100428a.html> ("UnitedHealthcare [states] they will stop rescissions immediately"); Press Release, Health & Human Serv., HHS Secretary Kathleen Sebelius on WellPoint's Decision to Ban Rescissions in Advance of the Affordable Care Act's Requirement (April 27, 2010), available at <http://www.hhs.gov/news/press/2010pres/04/20100427b.html> ("WellPoint's announcement that it intends to end the practice of rescinding patients' coverage in advance of the Affordable Care Act's requirement"); *Hearing Transcript*, *supra* note 3, at 153-54 (recording the statements from the representatives of Wellpoint, UnitedHealth, and Assurant that they will not commit to a statement that their companies "will never rescind another policy unless there was intentional fraudulent misrepresentation in the application").

91. Bara Vaida, Scoreboard: Tracking Health Law Court Challenges, KAISER HEALTH NEWS (Mar. 23, 2011), <http://www.kaiserhealthnews.org/Stories/2011/March/02/health-reform-law-court-case-status.aspx?P=1#overturned>; see also Brief for the Respondent in Opposition, Virginia ex rel. Cuccinelli v. Sebelius, 728 F.Supp.2d 768 (2011) (No. 10-1014), available at <http://www.justice.gov/healthcare/docs/cuccinelli-v-sebelius-brief-respondent.pdf> (opposing the motion for an expedited hearing by the Supreme Court).

92. David M. Herszenhorn, *Senate Rejects Repeal of Health Care Law*, N.Y. TIMES, Feb. 2, 2011, at A20 ("Republicans said after the votes that they would persist in their efforts to overturn the law.")

93. See A.B. 2470, 2009-2010 Gen. Assemb., Reg. Sess. (Ca. 2010) (California bill codifying the same protections provided by Section 2712 with certain additional protections for individuals).

94. Schuman, *supra* note 3, at 700-01.

95. NAIC letter, *supra* note 3, at 1; Jaspen, *supra* note 20.

There is some criticism that Section 2712 does not go far enough. Alleged gaps in the legislation include: no requirement of a nexus between the condition behind the claim and the condition allegedly misrepresented, no limit on when an accepted policy becomes incontestable, no independent third-party review of rescission actions, and no enforcement mechanism for ensuring compliance.⁹⁶ Yet, most of these problems will be moot or substantially limited in 2014, when PPACA will ban medical underwriting for elements that are not related to geographical location, age or tobacco use.⁹⁷ In the interim three years, the efficacy of the prohibition will have to rely on its enforcement by state agencies such as California's Department of Managed Care, State Attorney General Offices, and State Insurance Commissioners. Whatever the fate of the PPACA, the federal prohibition on rescission should be preserved or reinstated at a state level in order to provide the necessary protection to consumers. Otherwise, individuals such as Otto Raddtaz's will continue to be victimized and the promise that "no one should be treated that way in the United States of America"⁹⁸ will remain unfulfilled.

96. NPWF Report, *supra* note 80, at 36-37.

97. Prohibition of Preexisting Condition Exclusions, 26 C.F.R. § 54.9815-2704T (2010).

98. Obama, *supra* note 1.